Had P.W. 1's evidence been that he raided the premises on information received and nothing more, there would have been on the authority of *Re Lim Kwang Teik & Ors.*[1] a presumption that the raid was regularly carried out under the Ordinance.

In his evidence P.W. 1 said he effected the raid under section 18 of the Ordinance, presumably under section 18(1), but made no mention of any information received. In cross-examination, however, he said that he acted "on the instructions of the O.C.P.D.". The words "on the instructions of the O.C.P.D." may well carry the implication that the O.C.P.D. authorised him to act under section 16 or 17 of the Ordinance. In either case a warrant was imperative. Or the words may mean that P.W. 1 acted on information given by the O.C.P.D. in such circumstances that the object of search would be defeated by the delay necessary for reducing the information to writing. It would have been desirable, in view of the uncertainty of the position in this case, for the prosecution to give positive evidence of compliance with all conditions necessary to make entry and search lawful. The O.C.P.D. was not called.

It cannot therefore be said that in this case the police officers in making the search and effecting the arrest were acting in exercise of their legitimate powers. There is evidence at the end of the prosecution case that the respondent resisted arrest by a show of force. As, however, in my opinion the search itself was illegal, as well as the arrest, the assault committed on the police is not punishable under section 353 of the Penal Code.

I am fortified in this view by the decisions in the following Indian cases.

In *Chandra Prasad* v. *Emperor*[2] an Excise Sub-Inspector proceeded to search the house of the accused whom he suspected of selling illicit ganja. Under the Act he had to record his reasons before he made the search. He failed to do so and when he made the search the accused assaulted him. It was held that the accused could not be convicted under section 353 as the Sub-Inspector could not be said to be acting in the exercise of his powers. In *Faquira & Anor.* v. *Emperor*[3] a Sub-Inspector raided the house of the accused upon information that the latter was in possession of illicit liquor but failed to arm himself with the necessary search warrant, and during the raid the accused assaulted him. The accused was convicted under section 353 but on appeal it was held that "in the absence of a search warrant it is more than doubtful whether it could be said that the Inspector and the constable under him were engaged in their duty as public servants, and the owner, the accused, had a right to resent invasion of his house." The conviction was set aside. In *Nonelal Gul Prasad* v. *Emperor*[4] a Tasildar made a report to the Sub-Divisional Magistrate of an offence under the Defence of India Rules against A. for making a false declaration of the quantity of wheat in his possession. The Magistrate directed him to report to the Station House Officer under the Defence of India Rule 81 which was done. While the Station House Officer was making a search of A's. house the Tasildar was present, but had no authority to issue a search warrant either under the Criminal Procedure Code or under the Defence of India Rule. At the time of the search the accused assaulted the Tasildar. It was held that the Tasildar must be deemed to have been present at the search as a public servant but not a public servant in the execution of his duty as such public servant. The offence was held to be committed under section 352 but not 353 of the Penal Code.

Although the conditions requisite to support a charge under section 353 of the Penal Code are lacking, I am satisfied that a *prima facie* case has been made out under section 352. I shall therefore remit the case to the learned Magistrate for him to amend the charge to one under section 352 for assaulting P.W. 3 only and direct him to call on the respondent for his defence.

*Appeal dismissed.*

*Case remitted back to Magistrate.*

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## VARATHARAJALU v. PUBLIC PROSECUTOR

[A. Cr. J. (Hepworth J.) February 21, 1960]

[Raub — Criminal Appeal No. 1 of 1960]

*Criminal Law and Procedure — Cheating — Abetment — Withholding dishonoured cheques in order to help payer — No evidence of contemporaneous or prior complicity — Whether amounting to abetment of cheating.*

*Criminal Procedure — Confession made at inquiry — Admissibility.*

This was an appeal from a conviction for the abetment of three offences of cheating by the first accused, one T.W.T., who held a licence to extract timber from the forest in Bentong issued by the District Forest Officer in that behalf. On the granting of such a licence it is the practice of the Forest Department to demand a deposit from the licensee for the purpose of ensuring that royalties could be deducted from it, if at any time the licensee is in default in the payment of royalties. It was also the rule to refuse to permit any further extraction of timber unless the deposit was kept up to the agreed amount. The allegations against the appellant were that he as the clerk at the Bentong Sub-Treasury had received certain cheques issued by the first accused in payment of royalties which had been dishonoured and returned to the Sub-Treasury, and that contrary to his duty he had failed to inform the District Officer so that the latter could prevent the extraction of further timber from the forest until payment was made to regularise the position. The appellant was alleged to have kept the dishonoured cheques in his possession for a period of 9 months without informing anyone that they had been dishonoured. On the matter coming to light, an enquiry was held by the State Financial Officer, at which the District Officer, the Sub-Treasurer, was present. At this enquiry the appellant was asked a number of questions for the purpose of ascertaining the position. During the course of this enquiry the appellant was alleged to have said that he held the cheques back in order to help T.W.T. There was no evidence whatever apart from this to connect the appellant with T.W.T.,

or to show that they had acted in concert, although there was a clear inference, if the appellant's admission could be accepted, that he had withheld the cheques so that T.W.T. could continue to extract timber without making any further deposit.

**Held:** (1) the statement by the appellant at the enquiry amounted to a confession that he acted in concert with T.W.T. and purported to show that he had abetted him as alleged in the charges. In the circumstances in which the statement was made it could not have been made vo'untarily and therefore was inadmissible;

(2) the action of the appellant in not returning the dishonoured cheques to the District Forest Officer as soon as they were received was an action which had taken place at a point of time after and not contemporaneously with or before that at which T.W.T. had done the acts which were alleged in the charge to constitute the offences which the appellant was supposed to have abetted. It could not accordingly be said that the actions of the appellant, whatever their motive, in the absence of any evidence of contemporaneous or prior complicity, were actions abetting the actions of the first accused which were alleged to justify the charges of cheating the District Forest Officer.

MAGISTRATE'S CRIMINAL APPEAL.

*G. S. Hill* for the appellant.

*Raja Azlan Shah* (Deputy Public Prosecutor) for the respondent.

**Hepworth J.:** This was an appeal from a conviction for the abetment of three offences of cheating in respect of which the appellant had been bound over. At the trial there had been two accused and the 1st accused, who had been convicted and sentenced to fines of $400, $300 and $300 respectively, had not appealed.

The facts, briefly, were that the 1st accused, one Toh Wai Teng, held a licence to extract timber from the forest in the Bentong District under a licence issued by the District Forest Officer in that behalf. On the granting of such a licence it is the practice of the Forest Department to demand a deposit from the licensee for the purpose of ensuring that the Department has funds from which, if at any time the licensee is in default in the payment of royalties, the amount due can be paid. The amount of the deposit is based on the average monthly amount of timber removed by the licensee. It appears that sometimes amounts payable from time to time in respect of royalties are not paid by reason of the cheques given in payment by the licensee not being met. Payment of that royalty can then be made good out of the deposit and it is the rule to refuse to permit any further extraction of timber until such time as the deposit has again been made up to the agreed amount.

In the case under consideration the allegations broadly were that the 1st accused had paid certain cheques to the Forest Department in payment of royalties and that such cheques had been dishonoured. On dishonour they were returned to the Sub-Treasury at Bentong. The Sub-Treasury clerk was the appellant. The District Officer, Bentong, for the time being was the Sub-Treasurer. On receipt of a dishonoured cheque given for payment of timber royalties it was the duty of the appellant to inform the District Forest Officer so that he could prevent the extraction of further timber from the forest until payment had been made to regularise the position. In this case, however, certain cheques paid by Toh Wai Teng in December, 1957, in payment of timber royalties were dishonoured and were returned to the Sub-Treasury, Bentong, where they were received by the appellant. The appellant kept these dishonoured cheques in his possession and did not inform anyone for a period of nine months that the cheques had been dishonoured.

On this coming to light, as a result I understand of an Audit query, an enquiry was held by the State Financial Officer, a Mr. Wilson, at which the District Officer, Bentong, the Sub-Treasurer, was present. At this enquiry the appellant was asked a number of questions for the purpose of ascertaining the position. During the course of this enquiry he was alleged by Mr. Wilson to have said that he held the cheques back in order to help Toh Wai Teng. There was no evidence whatever apart from this to connect the appellant with Toh Wai Teng, or to show that they had been in any way acting in concert. But there was a clear inference, if this admission could be accepted, that the appellant had withheld the cheques so that Toh Wai Teng could continue to extract timber without making any further deposit.

At no stage of the trial does it seem to have occurred to anybody what this statement by the appellant in fact amounted to and whether or not it was in the circumstances admissible. It seemed to me that in all the circumstances of the case this statement amounted to a confession that the appellant had acted in concert with Toh Wai Teng and purported to show that he had abetted him as alleged in the charges. It seemed to me that in fact this statement, as it was made at an inquiry by the chief financial officer of the State, the State Financial Officer, lasting some one and a half hours held in the presence of the appellant's immediate superior, the District Officer, Bentong, may very well have been inadmissible because it could not in those circumstances be said to have been made voluntarily. Had that been the case there was no evidence at the close of the prosecution case sufficient to justify the appellant being called upon for his defence. The learned President should have required further details from the State Financial Officer in regard to the circumstances in which the statement was made and as to what the State Financial Officer had said to the appellant and whether in fact there had been any inducement or threat.

There were in addition other serious objections to the conviction being permitted to stand. The person who it was alleged had been induced to act in a manner in which he would not otherwise have acted was the District Forest Officer and the District Forest Officer was not called as a witness. Although, had all the other evidence been admissible, it was arguable that

the surrounding circumstances pointed inevitably to the fact that the District Forest Officer had been induced so to act, it is clearly undesirable in a criminal case that the best possible evidence, in this case that of the District Forest Officer, should not have been called to substantiate one of the main allegations in the charge.

But the most pertinent objection of all was that the action of the appellant in not returning these dishonoured cheques to the District Forest Officer as soon as they were received was an action which had taken place at a point of time after and not contemporaneously with or before that at which Toh Wai Teng had done the acts which were alleged in the charges to constitute the offences which the appellant was supposed to have abetted. It could not accordingly be said that the actions of the appellant, whatever their motive, in the absence of any evidence of contemporaneous or prior complicity, were actions abetting the actions of the 1st accused which were alleged to justify the charges of cheating the District Forest Officer. The offence of abetment corresponds as nearly as one word can be said to correspond to another to the offence which is known in England of being an "accessory before the fact". It has no reference to "accessories after the fact".

In all the circumstances, therefore, it came as no surprise that the learned Deputy Public Prosecutor felt himself unable to support the conviction, and I agreed with his reasons.

Accordingly, I allowed the Appeal. The learned President had convicted the appellant on all three charges and then purported to bind the appellant over under section 173A of the Criminal Procedure Code. This was wrong, as binding over under section 173A of the Criminal Procedure Code cannot be ordered after a conviction has been recorded. I quashed the convictions and the order of binding over.

As in these circumstances the conviction against Toh Wai Teng could not be permitted to stand, I dealt with his case on revision, and quashed the convictions and sentences of fines of $400, $300, and $300 respectively on him and ordered the sum of $1,000 to be repaid.

*Convictions quashed.*

Solicitors: *Rodyk & Davidson.*

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## TUONG SOON HIN v. PUBLIC PROSECUTOR

**[A.Cr.J. (Neal J.) March 20, 1960]**

**[J. B. — Criminal Appeal No. 43 of 1960]**

*Road Traffic — Hired car — Permit to operate from place stated — Whether picking up non-paying passenger at another place on request of hirer amounted to breach of permit.*

The appellant was convicted on a charge of using his taxi in breach of the conditions attached to his Permit which authorised him to take passengers from Scudai to Johore Bahru, by taking 3 passengers from Gelang Patah to Johore Bahru. The appellant gave evidence on affirmation, stating that he had been hired at his base as fixed in his permit by a passenger to drive from the base at Scudai to Gelang Patah and back, that at Gelang Patah the hirer had brought two additional passengers into the taxi and arrangements had been made between the original hirer and the appellant to take all three of them to Johore Bahru. His evidence was corroborated by the person with whom he had the hiring.

**Held:** it was not a breach of the permit for the operator of the vehicle, at the request of the hirer to take on additional non-paying passengers.

**Obiter:** the appellant would have been operating from his base if he received a telephone call from a hirer to pick him up at a place other than the place named, and that he would also be operating from that base if he received a message emanating from a charterer.

MAGISTRATE'S CRIMINAL APPEAL.

*Abdullah bin Abdulrahman* for the appellant.

*Pawan Ahmad* (Deputy Public Prosecutor) for the respondent.

Neal J.: The appellant was convicted by the Magistrate, Johore Bahru, on the 20th July, 1959, in respect of the following charge:—

"That you on 11th June, 1959, at about 4.30 p.m. at Gelang Patah New Village, in the Police District of Gelang Patah, in the State of Johore, being the driver of a Public Service Vehicle No. K. 5338, did use the said vehicle in breach of the conditions attached to the P.S.V. Permit No. 17925 which authorised you to take passengers from Scudai to Johore Bahru, to wit, by taking 3 passengers from Gelang Patah to Johore Bahru and that you have thereby committed an offence punishable under Regulation 7 of the Motor Vehicles Commercial Use Regulations, (G.N. 30/45)".

Before me the appellant relied upon the following grounds of appeal:—

"(iii) The Permit P1 does not prohibit the permit holder from taking on passengers at the places alleged in the charge;

(iv) There was no evidence that P.W. 2 and P.W. 3 paid separate fares to constitute contravention of conditions of the Permit."

The evidence adduced before the Court below showed that the appellant was seen driving taxi No. K. 5338 out of the town of Gelang Patah towards Johore Bahru by a police corporal, who stated that he stopped the appellant, examined his permit (which was produced) and that he had seen the appellant pick up passengers (number not stated) at Gelang Patah. The prosecution also called two of the three passengers in the taxi, who stated that they got into the taxi at Gelang Patah, but they do not appear to have been asked as to the circumstances under which they got into the taxi.

When called upon to enter on his defence, the appellant gave evidence on affirmation, stating that he had been hired at his base as fixed in his permit, by a Chinese passenger to drive from the base at Scudai to Gelang Patah and back, that at Gelang Patah the hirer had brought two additional passengers into the taxi, and arrangements had been made between the original hirer and the appellant to take all the three of them to Johore Bahru. His evidence was corroborated by the person with whom he had the hiring.

At this stage I am aware that the Court below rejected the evidence of the defence on the